83-719

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-_____

PETER DURO,

Petitioner,

vs.

DISTRICT ATTORNEY, SECOND JUDICIAL DISTRICT OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

George Daly
101 N. McDowell Street
Suite 226
Charlotte, N.C. 28204
Tel: (704) 333-5196
Counsel for Petitioner

OF COUNSEL:
Norman B. Smith
North Carolina Civil Liberties
Union Legal Foundation, Inc.
700 Southeastern Building
Greensboro, N.C. 27401
Tel: (919) 274-2992

QUESTION PRESENTED

Whether North Carolina, which has radically diminished regulation of religious schools because of an announced State policy in favor of religious liberty, and which requires of these schools only that they notify the State that they are in operation, keep pupils in attendance for the same days and hours as do public schools, comply with health and safety requirements and administer periodic standardized tests, has a sufficiently weighty interest to allow it to prosecute petitioner for not sending his children to a public or religious school which petitioner's sincere Biblical beliefs prohibit him from allowing his children to attend, when petitioner provides a comprehensive academic education for his children in his home.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPORTED OPINIONS BELOW

The District Court opinion is not reported. The Circuit Court opinion is reported at 712 F.2d 96 (C.A. 4, 1983).

GROUND OF JURISDICTION OF THIS COURT

The Circuit Court Judgment sought to be reviewed was dated and entered July 14, 1983. There was no Petition for Rehearing. No extension of time to file this Petition for Certiorari has been sought (or is required). Jurisdiction is conferred on this Court by 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitutional Provisions:

United States Constitution, First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;..."

Statutes: North Carolina General Statutes, Chapter 115C.

"Article 26.

Attendance.

Part 1. Compulsory Attendance.

§ 115C-378. Children between seven and 16 required to attend.

Every parent, guardian or other person in this State having charge or control of a child between the ages of seven and 16 years shall cause such child to attend school continuously for a period equal to the time which the public school to which the child is assigned shall be in session. No person shall encourage, entice or counsel any such child to be unlawfully absent from school.

The principal, superintendent, or teacher who is in charge of such school shall have the right to excuse a child temporarily from attendance on account of sickness or other unavoidable cause which does not constitute unlawful absence as defined by the State Board of Education. The term "school" as used herein is defined to embrace all public schools and such nonpublic schools as have teachers and curricula that are approved by the State Board of Education.

All nonpublic schools receiving and instructing children of a compulsory school age shall be required to keep such records of attendance and render such reports of the attendance of such child-

ren and maintain such minimum curriculum standards as are required of public schools; and attendance upon such schools, if the school refuses or neglects to keep such records or to render such reports, shall not be accepted in lieu of attendance upon the public school of the district to which the child shall be assigned: Provided, that instruction in a nonpublic school shall not be regarded as meeting the requirements of the law unless the courses of instruction run concurrently with the term of the public school in the district and extend for at least as long a term.

The principal shall notify the parent, guardian, or custodian of his child's excessive number of absences from school after his child has five consecutive or 10 accumulated absences, whichever occurs first, unless the principal is satisfied that these absences are excused under the established attendance policies of the local board. Once the parents are notified, the school attendance counselor shall work with the child and his family to analyze the causes of the absences and determine steps, including adjustment of the school program or

obtaining supplemental services, to eliminate the problem. The attendance counselor may request that a law enforcement officer accompany him if he believes that a home visit is necessary.

Notification of a parent shall be in writing and shall state that the parent may be prosecuted under Part 1 of this Article if these absences cannot be justified under the established attendance policies of the local school board. The principal shall notify the prosecutor after 30 accumulated absences, unless he has notified the prosecutor sooner. Evidence that shows that the parents, guardian, or custodian were notified and that the child has accumulated 30 absences which cannot be justified under the established attendance policies of the local board shall establish a prima facie case that the child's parent, guardian or custodian is responsible for the absences. (1955, c. 1372, Art. 20, s. 1: 1956, Ex. Sess., c.5; 1963, c. 1223, s. 6; 1969, c. 339, c. 799, s. 1; 1971, c. 846; 1975, c. 678, s. 2; c. 731, s. 3; 1979, c. 847; 1981, c. 423, s. 1.)

Article 39.

Nonpublic Schools.

Part 1. Private Church Schools and Schools of Religious Charter.

§ 115C-547. Policy.

In conformity with the Constitution of the United States and of North Carolina, it is the public policy of the State in matters of education that 'No human authority shall, in any case whatever, control or interfere with the rights of conscience,' or with religious liberty and that 'religion, morality and knowledge being necessary to good government and the happiness of mankind...the means of education shall forever be encouraged.' (1979, c. 505; 1981, c. 423, s. 1.)

§ 115C-548. Attendance; health and safety regulations.

Each private church school or school of religious charter shall make and maintain annual attendance and disease immunization records for each pupil enrolled and regularly attending classes. Attendance by a child at any school to which this Part relates and which complies with this Part shall satisfy the require-

ments of compulsory school attendance: Provided, however, that such school operates on a regular schedule, excluding reasonable holidays and vacations, during at least nine calendar months of the year. Each school shall be subject to reasonable fire, health and safety inspections by State, county and municipal authorities as required by law. (1979, c. 505; 1981, c. 423, s. 1.)

§ 115C-549. Standardized testing requirements.

Each private church school or school of religious charter shall administer, at least once in each school year, a nationally standardized test or other nationally standardized equivalent measurement selected by the chief administrative officer of such school, to all students enrolled or regularly attending grades one, two, three, six and nine. The nationally standardized test or other equivalent measurement selected must measure achievement in the areas of English grammar, reading, spelling and mathematics. Each school shall make and maintain records of the results achieved by its students. For one year after the

testing, all records shall be made available, subject to the provision of G.S. 115C-196, at the principal office of such school, at all reasonable times, for annual inspection by a duly authorized representative of the State of North Carolina. (1979, c. 505; 1981, c. 423, s. 1.).

§ 115C-550. High school competency testing.

To assure that all high school graduates possess those minimum skills and that knowledge thought necessary to function in society, each private church school or school of religious charter shall administer at least once in each school year, a nationally standardized test or other nationally standardized equivalent measure selected by the chief administrative officer of such school, to all students enrolled and regularly attending the eleventh grade. The nationally standardized test or other equivalent measurement selected must measure competencies in the verbal and quantitative areas. Each private church school or school of religious charter shall establish a minimum score which must be attained by a student on the

selected test in order to be graduated from high school. For one year after the testing, all records shall be made available, subject to the provision of G.S. 115C-196, at the principal office of such school, at all reasonable times, for annual inspection by a duly authorized representative of the State of North Carolina. (1979, c. 505; 1981, c. 423, s. 1.)

§ 115C-551. Voluntary participation in the State programs.

Any such school may, on a voluntary basis, participate in any State operated or sponsored program which would otherwise be available to such school, including but not limited to the high school competency testing and statewide testing programs. (1979, c. 505; 1981, c. 423, s.1.)

§ 115C-552. New school notice requirements; termination.

(a) Any new school to which this Part relates shall send to a duly authorized representative of the State of North Carolina a notice of intent to operate, name and address of the school, and name of the school's owner and chief administrator.

(b) Any school to which this Part applies shall notify a duly authorized representative of the State of North Carolina upon termination of the school. (1979, c. 505; 1981, c. 423, s. 1.)

§ 115C-553. Duly authorized representative.

The duly authorized representative of the State of North Carolina to whom reports of commencing operation and termination shall be made and who may inspect certain records under this Part shall be designated by the Governor. (1979, c. 505; 1981, c. 423, s. 1.)

§ 115C-554. Requirements exclusive.

No school, operated by any church or other organized religious group or body as part of its religious ministry, which complies with the requirements of this Part shall be subject to any other provision of law relating to education except requirements of law respecting fire, safety, sanitation and immunization. (1979, c. 505; 1981, c. 423, s. 1.)

STATEMENT OF THE CASE

Petitioner, his wife, and their six children moved to Tyrell County, North Carolina, in January, 1981. Four of the children were then of school age and two were younger than school age. The Duros are Pentecostals and because of their religious beliefs refused to send their school-age children to the available schools in the County. Petitioner and his wife both experienced radical religious conversions in 1979 and thereby came to their present belief in the literal truth of The Bible. When the family moved to North Carolina (after Petitioner finished attending the Pentecostal Bible College in Maine where he enrolled after his conversion), Petitioner visited the available schools[1] and found that they violated the literal

---

[1] North Carolina has also radically deregulated private secular schools, N.C.G.S. 115C-555 to 562. These statutory provisions track, except for the statement of public policy in favor of religious liberty, N.C.G.S. 115C-547, supra, the provisions for religious schools. It does not appear that there were any private secular schools available to Petitioner's children.

commands of the Bible in at least the following ways.

1. Children at these schools dressed in unisex fashion, with girls wearing pants and short hair and boys wearing long hair. This style of dress offended Petitioner's Biblical beliefs because Petitioner believes that the Bible commands that men keep their hair short and not wear women's clothes, and that women keep their hair long and not wear men's clothes. The basis of his belief is the Scripture contained in Deut. 22:5, which says:

> "The woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman's garment: for all that do so are abomination unto the Lord thy God." See also, 1 Cor. 11:14-15, 6.

2. Children at these schools were taught that doctors can cure disease and injury, and on occasion in emergencies were taken to doctors for treatment. This belief and this practice is contrary to the Bible, which literally commands that Christians trust God to heal them by the laying on of hands, without the intervention of doctors. The basis of

Petitioner's belief to this effect is Mark 16:17-18, which says:

> "And these signs shall follow them that believe; In my name shall they cast out devils; ...and if they drink any deadly thing, it shall not hurt them; they shall lay hands on the sick, and they shall recover."

Since Petitioner's conversion his family has sought no professional medical attention despite suffering sicknesses, broken bones and concussions. In Petitioner's view Christians who patronize medical doctors believe in the Bible only when it suits them and not when it challenges them.

3. Children at the available religious school are taught that water baptism is necessary for salvation. This is contrary to the Bible, which commands in Romans 10:9:

> "That if thou shall confess with thy mouth the Lord Jesus, and shalt believe in thine heart that God hath raised him from the dead, thou shalt be saved."

****

Petitioner himself works in a worldly environment to make a living, but believes that the Bible commands that his

children not be educated in a worldly environment. "The Bible commands that because they are not qualified to go out and stand up to peer pressure and things like that. And when they are properly trained and they are 17, 18 or 19 years old, then they can go out into the world having proper background and be able to function in it."[2] Petitioner and his wife and children presently form a religious enclave, in which the children are nurtured and educated according to the Bible. Since coming to North Carolina Petitioner's wife has taught their children at home regularly every weekday from 8:30 or 9:00 a.m. until 2:00 p.m., and for as long thereafter as the children require to finish their work for the day, on all days that the public schools were in session. She has instructed them by means of the Alpha Omega Christian Curriculum, by which the children are taught English, Social Studies, Math, Science, Bible, and other subjects in a largely self-help, workbook style fashion. Petitioner's wife is available to answer

---

[2] Petitioner's Deposition, p. 65, ll. 8-14.

questions, make demonstrations, and grade tests. If the children do not score 80 percent on the test at the end of each book they must repeat the entire book. Samples of the Curriculum appear at A-32 ff. Petitioner's wife is a registered nurse and has completed one semester of college. Petitioner holds a Master of Science Degree in Education from the State University of New York at Albany and a lifetime New York Public School Teaching Certificate. The Alpha Omega Christian Curriculum is a comprehensive curriculum which is also employed at the local religious school. The District Court stated that this curriculum "appear[s] to the Court's unprofessional eye to offer instruction in the basic subjects commonly taught in the public schools except that they reflect in some respects a fundamentalist orientation as opposed to a scientific or secular orientation." A-7, n.2.

In February, 1981, Petitioner was prosecuted in the District Court of Tyrrell County for four counts of violation of N.C.G.S. 115C-378, supra, p. 2, the North Carolina Compulsory Attendance Law. In March, 1981, these

prosecutions were quashed for failure to allege that the statutorily required notice had been given to Petitioner. See, N.C.G.S. 115C-378, ¶¶4, 5. In April, 1981, Petitioner commenced this action in the United States District Court, Eastern District of North Carolina, seeking a declaratory judgment that the application of the Compulsory Attendance Law to him was unconstitutional and an injunction against its enforcement as to him. Jurisdiction was based on 28 U.S.C. 1343(3) and 42 U.S.C. 1983 was the applicable substantive law. After discovery the case was heard on cross-motions for Summary Judgment by The Honorable Franklin T. Dupree, Jr., Chief United States District Judge, Eastern District of North Carolina. On August 20, 1982, the Court issued its Memorandum of Decision, A-2, holding: that abstention was inappropriate; that Petitioner's refusal to enroll his children in school was sincere and religiously motivated; and that the State's interest was of insufficient weight to overcome Petitioner's religious liberty. This latter holding was largely premised on the 1979 deregulation of religious

schools, N.C.G.S. 115C-547, et seq., supra, p. 5, whereby the only legal requirements retained for religious schools were: that children attend "for a period equal to the time which the public school to which the child is assigned shall be in session," N.C.G.S. 115C-378; that the school "maintain annual attendance and disease immunization records" and "be subject to reasonable fire, health and safety inspections by State, county and municipal authorities as required by law," N.C.G.S. 115C-548; and that the school "administer, at least once in each school year, a nationally standardized test or other nationally standardized equivalent measurement selected by the chief administrative officer of such school, to all students enrolled or regularly attending Grades 1, 2, 3, 6 and 9." N.C.G.S. 115C-549. The test records are available for State inspection but the State retains no power to control the curriculum or require teacher competency in religious schools, whatever the test results may be. See, A-6.

The State, bereft by its statutes of any argument that quality of education

was after 1979 any longer a compelling State interest in North Carolina, asserted to the District Court that it had a weighty interest in guaranteeing "universal" education. The District Court found this argument to be "hollow," A-12, because it was without basis in fact. The State having clearly withdrawn any right to control religious schools, and having vacated the field so thoroughly that a religious school could become merely "a mouthpiece for some religious fanatic," A-13, did not assert any interest in the universality of education within any rational meaning of the word education. North Carolina religious schools may now quite legally graduate students who cannot read or add. The State has abdicated responsibility to provide any "education" for children not enrolled in the public schools.

The Circuit Court reversed. The finding of Petitioner's sincerity was not disturbed, A-26, but the State was found to have a sufficient interest in compulsory education because the safety, testing, etc., requirements were imposed and because assertedly "the welfare of the children is paramount and...their

future well-being mandates attendance at a public or non-public school." A-26. The Circuit Court did not mention any evidence in support of its conclusion regarding the welfare of the children.

ARGUMENT

The Circuit Court has seriously misconstrued Wisconsin vs. Yoder, 406 U.S. 205 (1972), reading it as a case dependent upon the uniqueness of Amish life rather than as a case about religious liberty. The Circuit Court has also found a compelling interest in a First Amendment case when the State legislature has said that none exists. The Circuit Court has, finally, denied Petitioner his historical right to direct the upbringing of his children.

1. The Circuit Court drew a distinction between Wisconsin vs. Yoder, 406 U.S. 205 (1972), which it viewed as heavily dependent upon both the unique nature of the Amish community and the fact that Amish parents wished for their children to remain resident in their rural self-sufficient community upon becoming adults, and the present case in which Petitioner does not belong to an

established religious community and, it is said, "expects [his children] to be fully integrated and live normally in the modern world upon reaching the age of 18." A-23. This distinction is twice false. Not only is Yoder misinterpreted, but the Circuit Court unfairly twists the intentions of Petitioner so as to make them seem different in substance from the intentions of Amish parents. Petitioner in no wise expects his children to "be fully integrated [or] live normally in the modern world." He expects them to live a radical religious Pentecostal life, which is not a "normal," secular life. Of course Petitioner, equally with the Amish, will not have legal control over his children once they become 18 years of age. He testified that when his children become adults, "then they can go out into the world having proper background and be able to function in it." Petitioner's Deposition, p. 65. But until that time his religion requires that he give them a Biblically literal education. The Circuit Court interpolated the requirement of "normally" functioning in the world, without having any basis in fact for so doing. It is a

holding of Yoder that religious separatism during high school "prepares individuals to be self-reliant and self-sufficient participants in society." 406 U.S. at 221. This holding includes the Amish children that later leave the separatist community. The basic academic education that Petitioner's children are being given prepares them to be evangelical Pentecostals who go into the world to witness their religion, as their parents wish, or to abandon their parents' religion when they become of age and yet make their own way capably in the world. At the least, Petitioner's children will be as well able to cope with modern society as are those Amish children who later choose to leave the separatist community and live in the secular world with an eighth grade education. A review of the Alpha Omega Christian Curriculum which Petitioner's children are learning shows that any of them may become, if they wish, Pentecostal historians, Pentecostal auto mechanics, Pentecostal bankers, Pentecostal ballet dancers, or of course non-Pentecostals of any type. In their final year of English, Petitioner's children

will study, inter alia, theories of the origin of language, Chaucer, Hamlet, Goldsmith, Keats and Hopkins. In mathematics they will study ordered-pair numbers, probability, permutations, polynomials, quadrental angles, trigonometric equations, etc. Petitioner does not claim that the State may not require that he meet certain standards for home instruction. See, A-14-15. But education outside the home is neither so venerable nor so prized that it may claim to be the exclusive benchmark of competent citizenship. Abraham Lincoln was able "to participate effectively and intelligently in our open political system," Yoder, 406 U.S. at 221, despite his lack of formal education. Supervised home education is allowed in other states and countries. See, e.g., State vs. Riddle, 285 S.E.2d 359 (W.Va. 1981); Rev. Stat. Alberta (Canada), Ch. S-3, § 143(1)(a). Only in this century has compulsory education beyond the eighth grade been required. As recently as 1972 six states required only an eighth grade education and Mississippi had no compulsory education law at all. Wisconsin vs. Yoder, 406 U.S. at 226,

n. 15. This Court has stated that a state may refuse to accept home instruction as compliance with compulsory education statutes, Board of Education vs. Allen, 392 U.S. 236, 246-47 (1968), but this remark was made in a non-religion context, see Id., n. 8 (citing People vs. Turner, 121 Cal. App.2d 861, 263, P.2d 685 (1953), appeal dismissed for want of a substantial federal question, 347 U.S. 972 (1954), a "right to home education" for other than religious reasons case). Petitioner's children may fail to obtain some socializing skills, but making square pegs is not a compelling state interest. To force Petitioner's children to attend public or religious schools would force Petitioner to expose them to teachings that are prohibited by his religion.

2. N.C.G.S. 115C-547 provides:

> "In conformity with the Constitutions of the United States and of North Carolina, it is the public policy of the State in matters of education that 'No human authority shall, in any case whatever, control or interfere with the rights of conscience,' or with religious liberty and that 'religion, morality and knowledge being

> necessary to good government and the happiness of mankind ...the means of education shall forever be encouraged.'" (emphasis supplied)

The quoted words are drawn from the North Carolina Constitution, Art. I, Sec. 13. The statute is a clear statement that North Carolina values religious liberty at least as highly as it values academic competence. The Circuit Court, however, somehow found that North Carolina had retained a "compelling interest in compulsory education," A-25, despite that the State does virtually nothing to assure that "education" takes place in religious schools. Since North Carolina has given up control of the quality of education in religious schools, it cannot assure that they will educate children at all, in the secular sense of education as teaching skills necessary to function in modern America. Religious schools could, for example, adopt a monastic regimen of fasting, contemplation and religious study, and give no academic instruction whatever, yet operate in a manner consistent with North Carolina law. The North Carolina General Assembly has decided to allow that possi-

bility (just as Burma and India have allowed that actuality for centuries). But this being so, compelled exposure to "education" is a hollow claim. What can be compelling about forcing children to attend a school that is not required to educate them? The compelling interest test is essentially a legalistic formulation of the general proposition of political philosophy that ultimate necessity finally trumps freedom, and the corollary proposition that ultimate necessity must be carefully separated from rhetoric which claims ultimate necessity but does not demonstrate it by legally and humanly convincing proof. Hysteria, self-interest, fear of change, hard-headedness, attachment to privilege, and simple inertia all have a way of staking a claim to the "compelling" necessity of their position. The compelling interest test exists to prevent their triumph except in cases of provable ultimate necessity. If the enemy is truly at our shores the government may do whatever is necessary, including abridgement of liberty, to assure that it will survive and be able to later guarantee liberties again. But history teaches

that the trumpet of necessity is often blown prematurely. See, Korematsu vs. United States, 323 U.S. 214, 225 (1944) (Roberts, J., dissenting). That seems to be the case here. The Circuit Court has found a compelling interest on behalf of North Carolina despite that it is quite possible that Petitioner's children will learn less of the three Rs at school than at home.

Although the Circuit Court did not overturn the District Court's finding that Petitioner was sincerely and religiously opposed to sending his children to the available schools, it was obviously ill disposed toward Petitioner. The Circuit Court never mentions the central fact that Petitioner's religious beliefs are drawn directly from the Bible. Rather, the Circuit Court gratuitously commenced its opinion with the observation that other Pentecostals do not believe as Petitioner does. A-17. This is an irrelevancy. Petitioner's religion is based on The Bible, not on Pentecostal mores.

4. Finally, the Circuit Court relied on "the welfare of the Duro children." A-25, n.3. The Circuit Court

found that North Carolina had guaranteed children the "right to an education that will prepare them for their future." Even if this generality is correct as a matter of State law, which is not clear, the North Carolina General Assembly, by enacting N.C.G.S. 115-547 to-554, has indicated that that "future" could be a religious rather than an academic future. Also, in Wisconsin vs. Yoder, Justice Douglas, the lone dissenter, would have held that the State had a legitimate interest "in seeking to develop the latent talents of its children [and] in seeking to prepare them for the lifestyle that they may later choose..." Id. at 240. The other members of the Court rejected this proposition and solved the case as a contest between the religious rights of the parents and the educational rights of the State. The Circuit Court has, despite Justice Douglas's lack of success, again imported the rights of the children into the equation. If the Court grants this Petition, Petitioner respectfully urges that counsel or amicus be appointed to speak for the interests of his children; but the present law appears

to be that courts should not consider the interests of the children in preparing now for a lifestyle they may later choose. For now they live within their parents' lifestyle. See, Meyer vs. Nebraska, 262 U.S. 390 (1923); Pierce vs. Society of Sisters, 268 U.S. 510 (1925); Prince vs. Massachusetts, 321 U.S. 158 (1944). There is no hint in the record that the children are being maltreated. They are just being given a strict religious upbringing.

Respectfully submitted, this the 11th day of October, 1983.

George Daly
Suite 226, One North McDowell
101 North McDowell Street
Charlotte, N.C. 28204
Telephone: (704) 333-5196

Counsel for Petitioner

OF COUNSEL:
Norman B. Smith
North Carolina Civil Liberties
Union Legal Foundation, Inc.
700 Southeastern Building
Greensboro, N.C. 27401
Telephone: (919) 274-2992

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

CERTIFICATE OF SERVICE

I, George Daly, a member of the bar of this Court, do on my oath certify that I personally deposited 40 copies of the foregoing Petition for Writ of Certiorari in the United States Post Office, Charlotte, North Carolina, on October 10, 1983, with first class postage prepaid, properly addressed to Clerk, United States Supreme Court, 1 First Street, N.E., Washington, D.C., 20543, and also three copies hereof to Andrew A. Vanore, etc., attorney for Respondent. I know of my own knowledge that this mailing took place on October 10, 1983, having personally done it.

George Daly

George Daly
Suite 226, One North McDowell
101 North McDowell Street
Charlotte, North Carolina 28204
Telephone: (704) 333-5196

Attorney for Petitioner

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

VERIFICATION

I, Kay Thomas, a Notary Public of the State of North Carolina, County of Mecklenburg do hereby verify that George Daly appeared before me, this the 11th day of October, 1983, and executed the foregoing Certificate of Service.

This the 11th day of October, 1983.

Kay Thomas
Notary Public

My Commission Expires:
7-24-88

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
ELIZABETH CITY DIVISION

PETER DURO, Plaintiff,	)	No. 81-13-CIV-2
vs.	)	MEMORANDUM OF DECISION
DISTRICT ATTORNEY, SECOND JUDICIAL DISTRICT OF NORTH CAROLINA, Defendant.	)	

This action is before the court for ruling on the parties' cross-motions for summary judgment. The motions were taken under advisement after a hearing on July 7, 1982. Additional briefing was solicited from the parties and the motions are now ripe for disposition.

Plaintiff Peter Duro moved to Tyrrell County, North Carolina, in January, 1981. He and his wife, Carol, have six children, five of whom are school age. He claims that his religious beliefs preclude him from enrolling his children in a public school or the only available nonpublic school, so he has not enrolled his children in school. On February 10, 1981, four

warrants were issued in Tyrrell County charging him with violations of N.C.G.S. § 115C-378, the North Carolina compulsory school attendance law. The warrants were quashed because of technical defects, and plaintiff then filed this action against the District Attorney for Tyrrell County claiming that N.C.G.S. § 115C-378 is unconstitutional as applied to him.

The defendant has stipulated that plaintiff's religious beliefs are sincere. Mr. and Mrs. Duro underwent conversion experiences and became Pentecostal Christians. He attended a Pentecostal Bible college in Maine for a year before moving to North Carolina. He describes himself as a fundamentalist and believes in the literal truth of the Bible, does not believe in ordination by or membership in any organized church, and believes that he has been called by God to start a church and a school.

Available to him in Tyrrell County for the education of his children are the public schools and one church-related school, the Cabin Swamp Christian School. He declined to enroll his children in public schools because of a concern that they would be exposed to "secular human-

ism" and "situation ethics." He does not want his children to acquire "unisex" habits of dress or manner and does not want them given medical care in case of illness or emergency. He investigated the Cabin Swamp but found in its approach important theological differences from his beliefs as well as a "unisex" style and an acceptance of medical treatment for injuries or illnesses. Although many of his objections to the available schools relate to secular matters, he believes that the Bible and God command him not to seek "counsel from any person that's not Godly, which in our case would be - you know -adhering to the principles that the Bible teaches. And that would be very difficult receiving that kind of counsel in - in any kind of public institution." Duro Deposition at 49. Thus, he believes that he would incur the wrath of God if he sent his children to either the public schools or the Cabin Swamp Christian School. Complaint ¶6. He does not believe that no acceptable school could be conceived, for he sent his children to school while attending Bible college.

The North Carolina compulsory school attendance law requires all children of school age to attend a school, which is defined "to embrace all public schools and such nonpublic schools as have teachers and curricula that are approved by the State Board of Education." N.C.G.S. § 115C-378. In light of amendments made in 1979 and 1981 to the statutory provisions governing nonpublic schools, "approval" by the State Board of Education of a school is in fact nonexistent. The North Carolina General Assembly has radically deregulated the operation of nonpublic schools and removed from the State Board any supervisory authority. So long as a school notifies the Board that it is in operation, keeps attendance records, complies with health and safety requirements, and administers periodic standardized tests, attendance at the school qualifies under N.C.G.S. § 115C-378. Moreover, the school is subject to no "other provision of law relating to education." N.C.G.S. §§ 115C-554, 562. Indeed, the General Assembly stated as the educational policy of the state that "in matters of education...'[n]o human authority shall, in

any case whatever, control or interfere with the rights of conscience,' or with religious liberty." 1979 N.C. Sess. Laws c. 505, codified at N.C.G.S. § 115C-547 (quoting North Carolina Constitution Article I, § 13). The Board cannot prescribe curricula, teacher certification requirements, teacher-student ratios, graduation criteria, or other standards of performance for any nonpublic school.[1] Therefore, it is sufficient under North Carolina law for a "school" to take attendance and every few years to give standardized tests, and no matter what else happens during the day and no matter whether any attempt whatsoever is made to impart the basic skills

---

[1] Pursuant to N.C.G.S. §§ 115C-550 and 558, nonpublic schools must select and administer a competency test to its eleventh graders and must determine what score must be achieved on the test by a student in order to graduate. As the statute is written, however, the school has complete control over the selection of the test and the qualifying score and therefore may graduate even students reading on a second-grade level. The state has retained the authority to inspect the test results but not any authority to act in light of the results.

which are the ordinary goal of education, the state accepts attendance at the school as sufficient in fulfilling any interest the state has.

In challenging the compulsory school attendance law, plaintiff contends that his right to freely exercise his religious beliefs is infringed and that there is no compelling state interest being served by the law. He contends that the instruction his children receive at home is at least equal to and perhaps superior to that received in either the public or the Cabin Swamp schools.[2]

---

[2] The Duro children are taught through the means of a programmed self-explanatory curriculum called the Alpha Omega Christian Curriculum, which is also used at the Cabin Swamp School. Although Mr. Duro is a certified teacher, he is not involved in the instruction, which is carried out and supervised by his wife. Mrs. Duro is not certified as a teacher. The instruction is scheduled for the hours of 9:00 a.m. to 2:00 p.m. every weekday. Samples of the instructional materials are attached to the affidavit of Carol Duro. They appear to the court's unprofessional eye to offer instruction in the basic subjects commonly taught in the public schools except that they reflect in some respects a fundamentalist orientation as opposed to a scientific or secular orientation.

The first issue to be addressed is the question of whether the court should abstain from reaching the merits in this case. No proceedings are pending in state court against plaintiff, so abstention is not required under Younger vs. Harris, 401 U.S. 37 (1971).[3] The court has been informed that the unresolved state law question of whether home instruction might qualify for purposes of the compulsory attendance law under the new deregulated scheme will not be reached in the near future in other pending state cases not involving the Duros. Moreover, the Duros state that their religious beliefs not only prevent them from sending their children to the available schools but also prevent them from administering in their home the required standardized tests, so the question of whether their home would be considered a "school" under state law if they attempted to comply with the minimal requirements of state law is not even

---

[3] Plaintiff does, however, have a case or controversy, since defendant has indicated that he will prosecute plaintiff for violating N.C.G.S. § 115C-378 in the future if complaints are received.

present in the case. There are, therefore, no uncertain issues of state law which if resolved might avoid the necessity of a constitutional decision. See, e.g., Railroad Commission of Texas vs. Pullman Company, 312 U.S. 496 (1941). Accordingly, the court has determined that abstention would be inappropriate.

The first question then is whether plaintiff has a sincere religious belief which is infringed by enforcement of the compulsory attendance law. Wisconsin vs. Yoder, 406 U.S. 205, 214 (1972). Defendant contends that the only beliefs infringed are ones which arise from a rejection of contemporary secular values, beliefs which under Yoder do not qualify as "religious." As a factual matter defendant overlooks the degree to which plaintiff bases his beliefs in scripture and the fact that he believes that he personally will suffer God's wrath if he subjects his children to instruction by non-believers. More importantly, however, defendant's position neglects the recent decision in Thomas vs. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981), where the Court clearly stated that "it is not within the

judicial function and judicial competence" to determine the validity of a religious belief. The court must only determine whether, in this instance, plaintiff has refused to send his children to school "because of an honest conviction that such...was forbidden by his religion." Id. at 716. It is clear to the court that Peter Duro is acting out of an honest conviction that obedience to the compulsory attendance law is forbidden by his religion. Although the court is not greatly sympathetic with his beliefs, they are not "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." Id. at 715.

The court must therefore turn to the second question, which is whether the state's interest in the statute is of "sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." Wisconsin vs. Yoder, supra, 406 U.S. at 214. In the abstract, the state has a compelling interest in compulsory school attendance as a means of assuring that all children in the state receive a basic education sufficient to prepare them for the duties

of citizenship, for participation in the political process, and for a self-sufficient and productive position in the society. Wisconsin vs. Yoder, supra, 406 U.S. at 221. When a state is attempting to insure that educational standards are being met, it may refuse "to accept instruction at home as compliance with compulsory education statutes." Board of Education vs. Allen, 392 U.S. 236, 246-47 (1968). Moreover, the state "may require that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction under the supervision of teachers of specific training and covering certain prescribed subjects." Lanner vs. Wimmer, 662 F.2d 1349, 1353 (10th Cir. 1981). Cf., Windsor Park Baptist Church vs. Arkansas Activities Association, 658 F.2d 618 (8th Cir. 1981). In addition, "courts are... ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when

faced with religious claims for exemption from generally applicable educational requirements." Wisconsin vs. Yoder, supra, 406 U.S. at 235.

Here, however, the State of North Carolina has abdicated its interest in the quality of the education received by students in nonpublic schools in favor of "the rights of conscience." N.C.G.S. § 115C-547. Claiming no interest in the quality of education received by the children of North Carolina who attend nonpublic schools, the state instead asserts that it has a compelling interest in guaranteeing that education is "universal." Indeed, the North Carolina Constitution provides that "the people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." Article I, § 15. The state protects that right by operating a system of free public schools which all children may attend. But the argument that there is a compelling interest in universal education when the required education may be devoid of even minimal quality is correctly characterized by the plaintiff as "hollow." The state hopes that "the collective

concerns, demands and pressures of parents of private school children" will insure that the nonpublic schools provide an education which includes the fundamental skills necessary for self-sufficient and productive life in the society and for participation in its political process. The state "does not permit home instruction because [it] has no mechanism by which to assure that children in a home with their parents are provided access to any education whatsoever." Defendant's Supplemental Brief at 4. But the same is true of the state's relationship with the nonpublic schools; whether or not children are provided a minimum education is entirely dependent upon the parents' interest and motivation, since a school may exist which provides no education at all but is rather a mere caretaker or a mouthpiece for some religious fanatic.[4]

---

[4] Defendant also attempts to rely on United States vs. Lee, _____ U.S. _____, 102 S.Ct. 1051 (1982), for the proposition that the position accorded religious liberty by the General Assembly has no bearing on the case. Lee, however, concerned a claim of religious exemption to Social Security taxes based upon the fact

The state has so drastically undercut its asserted interest in the universality of education that the court cannot conclude that what survives is compelling. If the state makes no attempt to maintain minimal educational standards in nonpublic schools, its requirement that a school be attended is little more than empty coercion, particularly when those children are in fact being relatively well-educated at home.

The court must therefore hold that the compulsory attendance law of North Carolina may not be applied to this plaintiff. The court wishes to make very clear the narrow scope of this holding. First, it has no bearing on the state's authority to enforce the law against any other person. Second, it should not be read as limiting the state's authority to impose minimum standards on nonpublic schools or to develop a mechanism per-

---

[4] (continued) that some other class of persons enjoyed an exemption. The court held that the statutory exemption, applying to a different situation, did not strengthen plaintiff's position. Id. at 1054-55. Here, in contrast, the statutory language is an explicit statement of policy rather than a rule applying to a discrete situation.

mitting home instruction under supervision such as that permitted by many states or to impose such standards on Mr. Duro. See, e.g., State vs. Riddle, 285 S.E.2d 359 (W.Va. 1981). Such a system may provide "a reasonable vehicle for both balancing and reconciling the competing aims of state education and the proper exercise of first amendment, free exercise rights." Id. at 363. The court feels compelled to reach this result despite its lack of sympathy with the plaintiff's beliefs and with the abandonment by the State of North Carolina of any supervision over non-public education.

Accordingly, plaintiff's motion for summary judgment must be granted. A judgment will be entered declaring the statute unconstitutional as it applies to him and enjoining defendant from enforcing it against him.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

August 20, 1982.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1806

Peter Duro, Appellee,

vs.

District Attorney, Second
Judicial District of
North Carolina, Appellant.

North Carolina School
Boards Association, Amicus Curiae.

Appeal from the United States District
Court for the Eastern District of North
Carolina, at New Bern. Franklin T.
Dupree, Chief District Judge.

Argued: March 8, 1983
Decided: July 14, 1983

Before HALL and SPROUSE, Circuit Judges;
and BUTZNER, Senior Circuit Judge.

Andrew A. Vanore, Jr. (Edwin M.
Speas, Jr., Special Deputy Attorney
General on brief) for Appellant; George
Daly (Charles E. Craze, Gibbs & Craze;
Wendell Hutchins, Hutchins, Cockrell &
Newmann on brief) for Appellee;
(George T. Rogister, Jr., Kim C.
Wetherill, Tharrington, Smith &
Hargrove on brief) for Amicus Curiae
North Carolina School Boards Association.

HALL, Circuit Judge:

Peter Duro (Duro) initiated this action against the District Attorney of the Second Judicial District of North Carolina (D.A.) alleging that his religious beliefs were infringed by the North Carolina compulsory school attendance law, N.C.G.S. § 115-378. The district court entered a summary judgment for Duro, from which the D.A. appeals. We find that North Carolina has demonstrated an interest in compulsory education which is of sufficient magnitude to override the religious interest claimed by Duro. Therefore, we reverse.

I.

Duro, his wife and six children, five of whom are now of school age, have resided in Tyrrell County, North Carolina since January, 1981. Duro and his wife are Pentecostalists. This religion does not require that children be taught at home; in fact, the majority of children whose parents are members of the Pentecostal Church, which the Duros attend, are enrolled in a public school. Notwithstanding this, Duro refuses to enroll his children in a public school or the only available nonpublic school, Cabin

Swamp Christian School, operated by the Church of Christ.

According to Duro, exposing his children to others who do not share his religious beliefs would corrupt them. In particular, Duro is opposed to what he terms the "unisex movement where you can't tell the difference between boys and girls and the promotion of secular humanism..." Furthermore, Duro objects to the use of physicians and refuses medical attention for all physical ailments because he believes the Lord will heal any problem. Because of these beliefs, the Duro children are taught in their home away from any "non-Christian beliefs and actions." However, despite Duro's concern that his children be sheltered from corrupting influences, he admits that when they reach eighteen years of age, he expects them to "go out and work...in the world."

Although Mrs. Duro has assumed the responsibility for teaching the children, she does not possess a teaching certificate and has never been trained as a teacher. She implements a "self-teaching" program, the Alpha Omega Christian Curriculum, which is the same,

method of instruction used at Cabin Swamp Christian School. Duro himself does not participate in the instruction of the children.

On February 10, 1981, Duro was charged with four counts of violation of the North Carolina compulsory school attendance law, which requires that children between the ages of seven and sixteen must attend school. N.C.G.S. § 115C-378. However, the warrants were quashed because of technical defects. Duro filed this action on April 2, 1981, alleging that the statute in question, as it applied to him, violated the First and Fourteenth Amendments to the United States Constitution because his religious beliefs prohibit him from sending his children to a public or nonpublic school. On August 20, 1982, the district court granted Duro's motion for summary judgment. From that decision, the D.A. appeals.

II.

The district court relied heavily upon Wisconsin vs. Yoder, 406 U.S. 205 (1972), in holding that North Carolina's compulsory school attendance law was unconstitutional, as it applied to Duro,

In Yoder, the Court held that there are two issues which must be considered in cases such as this: (1) whether a sincere religious belief exists, and (2) whether the state's interest in compulsory education is of sufficient magnitude to override the interest claimed by the parents under the Free Exercise Clause of the First Amendment. The Court recognized that generally a state has a compelling interest in compulsory education, in order to "prepare citizens to participate effectively and intelligently in our political system" and to "prepare individuals to be self-reliant and self-sufficient participants in society." Id. at 221. The Court employed a balancing process between the state's interest in compulsory education on one hand, and the religious beliefs of parents regarding the upbringing of their children on the other hand.

The district court found that Duro, like the parents in Yoder, expressed a sincere religious belief[1/] that school

---

[1/] According to the district court, Duro based his belief in the scripture. Further, the court noted that Duro acted "out of an honest conviction that obedi-

enrollment would corrupt his children. We find, however, that the district court, in reaching its conclusion, incorrectly interpreted and applied Yoder, because it arose in an entirely different factual context from the present case. Nevertheless, in balancing Duro's religious belief against North Carolina's interest in compulsory education, keeping in mind both the children's future well-being and their state constitutional right to an education, we find the balance in this case tips in favor of the state.

1/ (continued) ence to the compulsory attendance law is forbidden in his religion."

In Thomas vs. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981), the Supreme Court addressed the question of what constitutes a religious belief. The Court held that, "religious beliefs need not be acceptable. logical, consistent or comprehensible to others in order to merit First Amendment protection." Id. at 714. The Court concluded that the narrow function of a reviewing court is to determine whether there was an appropriate finding that the petitioner acted in an "honest conviction that such [action] was forbidden by his religion," Id. at 716.

The facts in the present case are readily distinguishable from the situation in Yoder. In that case, Amish parents were convicted of violating Wisconsin's compulsory school attendance law by refusing to send their children to public or private school after they had graduated from the eighth grade. The Court, in reversing the parents' convictions and holding that they had a valid First Amendment defense to the prosecution, closely examined and scrutinized the unique nature of the Amish community. The evidence in Yoder revealed that the Amish children attended public schools for the first eight grades, following which the Amish provided informal vocational education to prepare their children for life in their rural self-sufficient community. The Court stressed the fact that for almost 300 years the Amish society had not altered their lifestyle, which was centered around a separate agrarian community away from "worldly" influence. Because the Court found that secondary school education emphasized "intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success and social

life with other students," it was held to be contrary to the Amish beliefs and way of life. Id. at 211. Thus, the Court concluded that requiring Amish children to be exposed to such influence would pose a threat of undermining the entire Amish community and religion. Therefore, in view of the unique facts and circumstances associated with the Amish community, the Court held that Wisconsin's interest in education was not so compelling as to override the sincere religious beliefs of the Amish.

The Duros, unlike their Amish counterparts, are not members of a community which has existed for three centuries and has a long history of being a successful, self-sufficient, segment of American society. Furthermore, in Yoder, the Amish children attend[ed] public school through the eighth grade and then obtained informal vocational training to enable them to assimilate into the self-contained Amish community. However, in the present case, Duro refuses to enroll his children in any public or nonpublic school for any length of time, but still expects them to be fully integrated and live normally in the modern world upon reaching the age of 18.

Despite North Carolina's deregulation of nonpublic education,[2/] we disagree with the district court that the state has abdicated its interest in the quality of education received by students in nonpublic schools. North Carolina continues to impose compulsory attendance requirements on all religious and nonpublic schools and further, requires that attendance and disease immunization records be maintained for all pupils. The schools are also subject to reasonable fire, health and safety inspections by public authorities. N.C.G.S. §§ 115C-548, 556. Moreover, each religious and nonpublic school is required to administer to all students enrolled in grades one, two, three, six, nine and eleven, a nationally standardized test whereby the state can monitor competency levels. §§ 115C-549, 550, 557, 558. Duro has not demonstrated that home instruction will prepare his children to be self-sufficient participants in our modern society or enable them to participate

---

[2/] See N.C.G.S. § 115C-547.

intelligently in our political system, which, as the Supreme Court stated, is a compelling interest of the state. Therefore, based on all the regulations imposed on religious and nonpublic schools, we find that North Carolina has maintained a compelling interest in compulsory education for the children of the state.[3/]

3/ In addition to the mandates of the Supreme Court in Yoder, we find that our chief consideration must be the welfare of the Duro children. When we examine their well-being, along with their state constitutional right to an education, we conclude that the children's right to an education that will prepare them for their future is paramount. Article 1, § 15 of the North Carolina Constitution expressly provides that, "[t]he people have a right to the privilege of education and it is the duty of the State to guard and maintain that right." The Court of Appeals of North Carolina, in Matter of McMillan, 30 N.C.App. 235, 237, 226 S.E.2d 693, 695 (1976), a case involving charges of neglect against parents for failing to enroll their children in the public schools, held:

> It is fundamental that a child who receives proper care and supervision in modern times is provided a basic education. A child does not receive "proper care" and lives in an "environment injurious to his welfare" when he is deliberately refused this education, and he is "neglected" within the meaning of [the statute].

III.

We find, therefore, that this case is factually distinguishable from Yoder. Despite Duro's sincere religious belief, we hold that the welfare of the children is paramount and that their future well-being mandates attendance at a public or nonpublic school.[4/] Furthermore, we conclude that North Carolina has demonstrated an interest in compulsory education which is of sufficient magnitude to override Duro's religious interest. Accordingly, the judgment of the district court is reversed.

R E V E R S E D.

SPROUSE, Circuit Judge, concurring:

I concur in my colleague's excellent opinion. If the issues were ones of first impression, I might completely agree, but I feel the majority of the Supreme Court in Wisconsin vs. Yoder, 406 U.S. 205 (1972), has established a path from which at times the majority strays.

[4/] Contrary to the concurring opinion, we are not suggesting that the Duro children have a right to choose whether or not to attend public school. We agree that this case in no way involves that issue.

The majority opinion in Yoder categorized two legitimate state interests in the education of children:

> [1] to prepare [its] citizens to participate effectively and intelligently in our open political system...[and]... [2] [to] prepare [its citizens] to be self-reliant and self-sufficient participants in society.

Id. at 221. Justice White, in a concurring opinion joined by Justices Brennan and Stewart, said that in addition to those interests recognized in the majority opinion, the state has a legitimate interest "in seeking to develop the latent talents of its children [and] in seeking to prepare them for the life style that they may later choose..." Id. at 240. Justice Douglas, the single dissenter, would have held that expansive constitutional rights attach directly to the children and balance in their favor against the First Amendment freedom-of-religion rights of their parents.

My problems arise from the following portions of the panel majority's opinion: In footnote 3, the majority states

> In addition to the mandates of the Supreme Court in Yoder, we find that

> our chief consideration must be the welfare of the Duro children. When we examine their well-being, along with their state constitutional right to an education, we conclude that the children's right to an education that will prepare them for their future is paramount. Article 1, § 15 of the North Carolina Constitution expressly provides that, "[t]he people have a right to the privilege of education and it is the duty of the State to guard and maintain that right."

In the final paragraph of its opinion, the panel majority concludes:

> We find, therefore, that this case is factually distinguishable from Yoder. Despite Duro's sincere religious belief, we hold that the welfare of the children is paramount and that their future well-being mandates attendance at a public or non-public school. Furthermore, we conclude that North Carolina has demonstrated an interest in compulsory education, which is of sufficient magnitude to override Duro's religious interest.

I concur in the above-quoted sections to the extent they may be read as saying that North Carolina has a legitimate interest in the welfare and future well-being of the Duro children.[1] While

---

[1] The use of the phrase "welfare and future well-being," I assume, connotes

recognizing that this may be a departure from the Yoder majority opinion, I believe such a consideration is appropriate under the facts of this case because of the young ages of the children involved--most of them were of grade school age, unlike the children in Yoder who had received eight years of formal education.

I must disagree, however, with two possible inferences which seem to follow from the above-quoted sections of the panel majority's opinion. First, the majority apparently gives weight, in balancing the state's interests, to a provision in the North Carolina Constitution which provides: "[t]he people have a right to the privilege of education and it is the duty of the State to guard and

---

[1] (continued) the preparation for participation in our political system and self-reliance explained by the majority in Yoder, as well as Justice White's reasoning concerning the development of latent talents and life-style of the child's choice. Additionally, the language used by my panel colleagues is sufficiently broad to include many other individual values or desires not contemplated by either the majority or concurring opinions in Yoder. I would confine the language narrowly to the facts of this case.

maintain that right." While I applaud that state constitutional expression, North Carolina cannot argue, and we cannot consider, that such expression increases its interests in educating children as against the parents' rights to exercise their religion freely. A state educational policy, constitutional or otherwise, simply is not added to the scales in balancing First Amendment rights. Whatever the balancing factors, they are inherent in the First Amendment itself.

Second, any possible inference from the above-quoted sections that in deciding this case we should consider the rights of the children to choose to attend school as against their parents' religious interests, is improper. The only issue before the court is the constitutionality of a state statute which seeks to compel the Duro parents to send their children to school. The children have not asserted their rights in this case. As Chief Justice Burger noted in Yoder, courts should exercise extreme caution in approaching the delicate balance between the Freedom of Exercise clause and the state's vital interest in

public education. At the very least, we should decline to theorize on issues which are not factually developed. The posture of this case is not different from the Yoder case in which all of the Justices, save the dissent, agreed that their case in no way involved any questions regarding the rights of the children to attend school.

SCIENCE 504

LIFEPAC TEST

Name Tania Duro
Date 11/24/81
Score 90%
Possible score 100

SCIENCE 504: LIFEPAC TEST

Match these Items (each answer, 3 points).

1. a take energy from the sun
2. d helps rot dead organisms
3. c food is mostly animal
4. a take water in through its roots
5. b plant eater
6. d fungus
7. c predator
8. X a rabbit
9. d helps return minerals to the earth
10. a tall grass

a. producer
b. first-order consumer
c. second-order consumer
d. decomposer

Write true or false (each answer, 2 points).

11. true The web of life includes plants.
12. true Chemicals are brought into plants as part of the mineral cycle.
13. true Photosynthesis is important to the balance of nature.
14. true Water evaporates during the water cycle.
15. Xfalse Animal bodies burn up water in making energy.

16. true The carbon cycle is part of the balance of nature.
17. true Some animals must eat other animals in order to receive energy.
18. Xfalse Humans can be predators.
19. true Polluted water can destroy fish and water plants.
20. false The first link in the food chain is bacteria.

Write the correct letter and answer on the blank (each answer, 5 points).

21. In the prairie past, the prairie had many more a. bison than today.

a. bison b. pigs c. grasshoppers

22. A plant that was brought to the prairie by settlers was c. wheat.

a. cactus b. sunflowers c. wheat

23. Tall grasses needed more a. water than short grasses.

a. water b. wind c. fire

24. On the early prairie b. fewer hawks than mice lived.

a. more b. fewer c. above the same number of

25. When people move into a natural habitat c. loss of life occurs.

a. loss of water b. loss of appetite
c. loss of life

26. Taking a good care of plants and animals is good c. stewardship.

a. luck b. health c. stewardship

27. You can take care of God's creation by b. walking or riding bike.

a. bothering nests b. walking or riding a bike

c. littering

MATHEMATICS
805

LIFEPAC TEST

Name Peter Duro
Date Nov. 3, 1981
Score 100%

MATHEMATICS 805: LIFEPAC TEST

Complete this item (each answer, 3 points).

1. The rules for multiplying common fractions are to find the numerator, a. multiply the numerators; to find the denominator, b. multiply the denominators.

Multiply or divide as indicated. Be sure the common fraction answers are reduced to lowest terms (each answer, 3 points).

2. 3/8 X 5/6 = 5/16
3. 2/3 X 6/7 = 4/7
4. 5/8 X 1/5 = 1/8
5. 4/9 X 1/6 = 4/54=2/27
6. 3 1/3 + 10 = 1/3
7. 4 1/6 + 2 1/3 = 1 11/14
8. 2 3/4 + 1 1/3 = 2 1/16
9. 5 1/5 + 3 2/3 = 1 23/55
10. 347.3 X 0.014 = 4.8622
11. 0.3 X 0.3 = 0.09
12. 571.1 X 0.0043 = 2.45573
13. 2.4 X 0.024 = 0.0576

14. $0.045\overline{)0.06480}$ = 1.44

	45
	198
	180
	180
	180
	0

15. $16.1\overline{)70,952.7}$ = 4407.

	64 4
	655
	644
	1127
	1127
	0

16. $341.3\overline{)21,959.242}$ = 6434

	20,478
	1 4812
	1 3652
	11604
	10239
	13652
	13652
	0

Work these per cent problems. Write the answers on the blanks (each answer, 3 points).

17. What is the % change from 120 to 150? 25% increase

18. What is the % change from 14 to 9.8? 30% decrease

19. 22% of 4.3 = what number? 0.946

20. 4.5 is what % of 25? 18%

21. 0.03% of 75 = what number? 0.0225

22. 27% of what number is 17.037? 63.1

23. 26.5% of what number is 0.12455? .47

24. 0.07 is what % of 25? .28%

LANGUAGE ARTS
502

LIFEPAC TEST

Name Tania Duro
Date 10/2/81
Score 95%
Possible Score 100

LANGUAGE ARTS 502: LIFEPAC TEST

Choose the correct word to complete the sentence (each answer, 3 points).

adjectives	details	mood	three
courage	fear	nouns	two
coward	main idea	subject	verbs

1. The story of Mafatu is the story of courage.

2. Mafatu had a strong emotional reaction of fear toward the sea.

3. Because of Mafatu's feeling, he acted like a coward.

4. An author uses emotion words to express a mood.

5. We find specific information by noting details.

6. The subject of a sentence tells who or what the author is talking about.

7. Words that name a person, place or thing are nouns.

8. Words that describe nouns are adjectives.

9. The English language has three standard forms of writing and speaking.

10. The diamond-shaped poem uses nouns, adjectives, and verbs.

Write an example of each item (each answer, 3 points).

11. One-word compound someone
12. Two-word compound footcream
13. Hyphenated compound high-handed
14. Hyphenated number word twenty-one
15. Hyphenated adjective high-held
16. Word with double consonants divided at end of line. He said you were classified. X
17. A noun Mafatu
18. An adjective pretty
19. An -ing verb jumbing
20. A spelling word that contained the abbreviation for October. octopus
21. An emotion word disgust
22. A contraction can't

Complete these items (each answer, 5 points).

23. Write a statement of fact from "The Flight." Mafatu father was the village chief.

24. Write a statement of opinion from "The Flight." Mr. Arm Strong Sperry had to write The Flight.

Write a paragraph describing something you have read or a personal experience. The paragraph must include an introductory sentence, three or more detail sentences, and a summary sentence (this activity, 14 points).

25. I have had a personal experience. When I went for a walk alone, I saw many things like frogs snakes and turtels. They were all along the side of the road in a big ditch. I allso saw a happy rabbit hopping across the road. I heard the branches blow, birds singing and grass swishing. I got a chill in my bones like something was going to get me - ran home.

Match the correct phrases to the words. Place the letter on the blank line in front of the word (each answer, 2 points).

26. d	author	a. Call It Courage
27. f	island	b. Kivi
28. h	Polynesians	c. nondescript dog
29. a	book	d. Armstrong Sperry
30. b	albatross	e. main ideas
31. i	lagoon	f. Hikueru
32. c	Uri	g. contraction
33. e	topic	h. fishermen
34. j	compound	i. small body of water connected to a larger one
35. k	terror	j. word made from two words
36. l	diamante	k. three-year old child in a hurricane
		l. a kind of poem

SOCIAL STUDIES
702

LIFEPAC TEST

Name Tony Duro
Date October 1, 1981
Score 96%

SOCIAL STUDIES 702: LIFEPAC TEST

Write true or false (each answer, 1 point).

1. true The seasons depend upon the angle of the earth's axis and the earth's position in its orbit.

2.X true In July the earth is closer to to sun than it is in May.

3. false The truest representation of the earth is a polar projection.

4. true Mt. Everest, the highest mountain in the world, is located in Asia.

5. true An interrupted-area projection shows the least distortion in land areas.

6. true Physical geography is the study of the physical features of the earth.

7. true Most of the land masses in the world are in the Northern Hemisphere.

8. false The circumference of the earth from pole to pole is 24,902 miles.

9. false The spring equinox is March 22.

10. true The dividing lines between the Eastern Hemisphere and Western Hemisphere are the prime meridian and the 180th meridian.

11. true The shortest day of the year in the Northern Hemisphere is December 21.

12. true Leap year occurs every four years.

13. Xfalse Mountains have the highest temperatures of any landform.

14. true Plains are able to support more people than other landforms.

15. true An imaginary line through the earth's center is called an axis.

Complete the following sentences using the word list (each answer, 3 points).

cultural geography	Sierra Nevada
physical geography	Allegheny
Appalachians	plateaus
Rockies	mountains
climatology	plains
Challenger Deep	hills
Cascades	oceans

16. The four major landforms are a. plateaus, b. mountains, c. plains, and d. hills.

17. The three mountain ranges in the United States are the a. Rockies, b. Appalachians and c. Sierra Nevada.

18. The study of man's culture is called cultural geography.

19. The study of climates and their effect on man is called climatology.

20. The deep floor of the ocean is the Challenger Deep.

Write the answer on the line that best describes the item (each answer, 2 points).

21. b lowest elevation
22. b easy transportation
23. a mining
24. d grazing
25. a highest elevation
26. d cool and dry
27. b industries
28. X b forests
29. d elevated flat land
30. b centers of population

a. mountains
b. plains
c. oceans
d. plateaus

No. 83-719

IN THE

Supreme Court of the United States

October Term, 1983

PETER DURO,

Petitioner,

vs.

DISTRICT ATTORNEY,
SECOND JUDICIAL DISTRICT OF
NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RUFUS L. EDMISTEN
Attorney General of North Carolina

Edwin M. Speas, Jr.
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Tele: (919) 733-7387
COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether Mr. Duro's reasons for failing to comply with North Carolina's compulsory attendance laws are religious in nature?

II. Even if Mr. Duro has constitutionally protected religious beliefs against sending his children to public or nonpublic schools, whether North Carolina's interest in compulsory education is of "sufficient magnitude to override" that interest?

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CASES (continued)

CONSTITUTIONAL PROVISIONS

STATUTES INVOLVED

MISCELLANEOUS TABLE

No. 83-719

IN THE

Supreme Court of the United States

October Term, 1983

PETER DURO,

Petitioner,

vs.

DISTRICT ATTORNEY,
SECOND JUDICIAL DISTRICT OF
NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests this Court to deny the petition of Peter Duro for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit entered herein on July 14, 1983.

STATEMENT OF THE CASE

Under North Carolina law, the parents of all children between the ages of 7 and 16 are required to enroll their children in public or non-public schools. See N.C.G.S. §115C-378, 548 and 556. The Attorney General has opined that a parent cannot meet this requirement by educating his children at home, 40 NCAG 211 (1969) and 49 NCAG 8 (1979), and the State Board of Education has adopted rules to that effect. 16 NCAC 2D.0402. Recently, the North Carolina Court of Appeals has confirmed that home instruction is not a permissible means of complying with

North Carolina's compulsory attendance law. *Delconte v. State of North Carolina,* ____ N.C. App. ____, ____ S.E. 2d. ____ (December 8, 1983).

Contrary to North Carolina law, petitioner, Peter Duro, chose to teach his children at home and was prosecuted by the respondent, the District Attorney for the Second Judicial District of North Carolina, for violation of N.C.G.S. §115C-378. On March 23, 1981, the warrants against Mr. Duro were quashed because of technical defects. Shortly thereafter, he filed this action in which he claims that N.C.G.S. §115C-378, as applied to him, violates the First Amendment to the United States Constitution because his religious beliefs prohibit him from sending his children to public or nonpublic schools.

Peter Duro is an office manager for a trucking firm. He and his wife have six children, five of whom are of school age. (J.A. pp. 22-23)[1] Their hopes for their children do not differ from other parents. They expect their children upon reaching eighteen to "go out and work in the world or function in the world." (J.A. pp. 79-80) "They're not going to be hermits." (J.A. p. 80)

Their children, however, are educated in their home. Mr. Duro is away from home during the day and does not participate in the instruction of his children, though he holds a teaching certificate from the State of New York as a business teacher. (J.A. pp. 34 and 69) That responsibility is Mrs. Duro's. Mrs. Duro does not hold a teaching certificate from any state and has never been trained as a teacher. (J.A. pp. 31-32)

The method of instruction used by the Duro's and implemented by Mrs. Duro does not involve any lecturing or active teacher involvement. Rather, their children are largely "self-taught" through the means of a programmed,

[1]Reference is to the Joint Appendix filed by the parties in the Fourth Circuit.

self-explanatory curriculum (The Alpha Omega Christian Curriculum) purchased by the Duros. (J.A. pp. 64-72) According to Mrs. Duro, "you don't need teachers" for this method of instruction. (J.A. p. 71)

The Duros are Pentacostal. They have no religious objections to education; nor do they have any religious belief which requires them to instruct their children at home. (J.A. pp. 106-107) Though not members of any particular church, the Duros attend the Assembly of God, a Pentacostal church, each Sunday evening. (J.A. p. 104) The majority of the members of that congregation send their children to public schools. (J.A. p. 105)

Upon arriving in Tyrrell County, in January of 1981, the Duros did not visit the public schools or present their children for enrollment because of concerns about "secular humanism" and "unisex dress" in the schools. (J.A. pp. 40-41) Mr. Duro did visit the Cabin Swamp Christian School, a school operated by the Church of Christ which has approximately 100 students. (J.A. p. 36) The Cabin Swamp School uses the same curriculum as the Duros. (J.A. p. 37) Mr. Duro, however, differs with the operators of the Cabin Swamp School on the issues of "unisex dress" and "water baptism".

Based on this evidence the District Court granted summary judgment for Mr. Duro and enjoined respondent from enforcing North Carolina's compulsory attendance laws against him. Respondent appealed to the Fourth Circuit and that court on July 14, 1983 reversed the District Court. This petition followed.

SUMMARY OF RESPONDENT'S ARGUMENTS

The First Amendment prevents state enactment of laws prohibiting or restricting the free exercise of religion. Mr.

Duro, however, does not enjoy absolute freedom of religion. While his freedom to believe remains inviolate, his freedom to act is subject to reasonable regulation for the protection of society. *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213 (1940).

This Court has established an orderly procedure for determining whether a state statute unconstitutionally infringes the Free Exercise Clause of the First Amendment. *United States v. Seeger*, 380 U.S. 163, 185, 85 S.Ct. 850, 863, 13 L.Ed. 2d 733 (1965). This two-part process requires the Court to determine: (1) whether a sincere religious belief is present and infringed by enforcement of the statute; and (2) if a sincere religion is present and infringed, whether the state's interest in the statute is of "sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed 2d 15 (1972).

The District Court held for Mr. Duro on both these issues. The Fourth Circuit held that while Mr. Duro did have religious beliefs against sending his children to the public schools or the available nonpublic schools, the State's interest in compulsory education was sufficient to override Mr. Duro's beliefs. It is respondent's position that Mr. Duro has not met either part of the free exercise test. First, Mr. Duro's objections to sending his children to public or nonpublic schools are personal and philosophical in nature and flow from a rejection of contemporary secular values. However sincere those beliefs may be, they are not beliefs which "rise to the demands of the Religion Clause" *Wisconsin v. Yoder, supra.* 406 U.S. at 215-216. Second, the State's interest in compulsory education is sufficient to outweigh Mr. Duro's interests. This Court has stated that a state may refuse to accept instruction at home as compliance with compulsory education statutes even in the face of religious beliefs to the contrary. *Board of Education v.*

Allen, 392 U.S. 236, 246-247, 188 S.Ct. 1923, 20 L.Ed 2d 1060 (1968). An examination of *Wisconsin v. Yoder, supra*, and other subsequent cases establishes the continuing viability of this principle.

REASONS FOR DENYING THE WRIT

I. Mr. Duro's reasons for failing to comply with the Compulsory Attendance Laws are not religious in nature.

The threshold question for determination here is whether Mr. Duro's reason for educating his children in his home are religious in nature. *United States v. Seeger, supra.* If those reasons are not religious in nature there is no First Amendment infringement and, accordingly, no need for further inquiry by the Court. *Africa v. Commonweath of Pennsylvania*, 662 F. 2d 1025, 1030 (3rd. Cir. 1981) *cert. den.* 456 U.S. 908, 102 S.Ct. 1756, 72 L.Ed. 2d 165 (1982).[2]

A determination of whether a particular belief is religious in nature "present[s] a most delicate question". *Wisconsin v. Yoder, supra*, 406 U.S. at 215. "It is nonetheless incumbent on the courts to insure that a free exercise claim is granted only when the threshold belief is religious in nature." *Callahan v. Woods*, 658 F. 2d 679, 685 (9th Cir. 1982). Any lesser standard is unacceptable for "the very concept of ordered liberty precludes allowing" Mr. Duro from making "his own standards on matters of conduct in which society as a whole has important interests." *Wisconsin v. Yoder, supra.*

This Court has provided guidance as to the type of analysis to be applied in determining whether a belief interposed against enforcement of a statute or regulation is

[2]In order to enjoy First Amendment protection a religious belief must also be sincerely held. *United States v. Seeger, supra.* Respondent, however, does not challenge the sincerity of Mr. Duro's beliefs.

religious in nature. The nature of the inquiry is factual, *United States v. Ballard,* 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944), but that inquiry does not extend to the truth, validity or reasonableness of the asserted religious belief.[3] This proscription includes any analysis of "intra-faith differences". *Thomas v. Review Board,* 450 U.S. 707, 751, 101 S.Ct. 1425, 67 L.Ed. 2d 624 (1981). This Court, however, has never provided lower courts with a comprehensive definition of religion for application in First Amendment cases. *Africa v. Commonwealth of Pennsylvania, supra,* 662 F. 2d at 1031; Note, *Toward a Constitutional Definition of Religion,* 91 Harv. L. Rev. 1056, 1057 (1978). Nevertheless, this Court has held that certain beliefs *are not* religious in nature. Under the Court's holding in *Wisconsin v. Yoder, supra,* beliefs which are "philosophical or personal" in nature or beliefs which manifest themselves in "a way of life...based on purely secular considerations" do not qualify for Firs Amendment protection.

The lower courts failed to take the distinction between religious beliefs and personal or philosophical beliefs into account in ruling for Mr. Duro on the first part of the Free Exercise test. When this distinction is taken into account, it becomes clear that petitioner failed to carry his initial burden.

Mr. Duro has no religious belief against education or any religious belief which requires him to educate his children in his home. His reasons for refusing to send his children to public or nonpublic schools have a far more narrow basis. According to Mr. Duro, he did not send his children to

---

[3] "I cannot give up my guidance to the magistrate; because he knows more of the way to heaven than I do & is less concerned to direct me right than I am to go right." JEFFERSON. *Notes and Proceedings on Discontinuing the Establishment of the Church of England* (1776), in 1 The Papers of Thomas Jefferson 525, 547 (J. Boyd ed. 1950), quoted in *Africa v. Commonwealth of Pennsylvania, supra,* 662 F. 2d at 1030 fn. 7.

public school because of the prevalence of "secular humanism" and "unisex dress" and he did not send his children to the Cabin Swamp Christian School because children enrolled there dressed in a "unisex fashion". Mr. Duro did express some differences between his religious beliefs and those of the operators of the Cabin Swamp School but he testified that the curriculum at Cabin Swamp is presented in such a way that it wouldn't be offensive to him or contradict his beliefs.

These beliefs, respondent contends, are philosophical and personal in nature, not religious in nature. The Third Circuit has adopted the principle that the extent to which a belief is based upon "ultimate concerns" should be the principal measure of whether a belief is religious or not. *Africa v. Commonwealth of Pennsylvania, supra,* 662 F.2d at 1032-1035. That position seems to have been adopted in large part from the views expressed by the author of *Toward a Constitutional Definition of Religion, supra,* at 1075-1076, where an ultimate concern is described as follows:

> Clearly not every belief—not even all those quite strongly held—constitutes a matter of ultimate concern. How is the individual to decide whether a view is his ultimate concern or merely a matter of great importance to him? Much of the concern about the expansive approach [to the legal definition of religion] reflects a fear that approach is undefinable, hence illimitable. Tillich describes two characteristics which may be helpful. (1) An ultimate concern is an act of the total personality, not a movement of a special and discrete part of the total being. ... Thus, the belief happens "in the center of the personal life and includes all its elements." (2) An ultimate concern must be unconditional, made without qualification or reservation. This attribute, in large measure an

> outgrowth of the first, prevents an individual from defining his ultimate concern conjunctively as "X and Y and Z." Each element cojoined implies a reservation or condition on the other elements. For example, should an individual try to define his ultimate concern as "helping my fellow men and achieving personal fulfillment," he runs afoul of problems of tradeoff. In some instances, a given action might advance one goal but only at the expense of the other. The goal the individual elects to compromise cannot be called ultimate.

The record clearly establishes that the beliefs which led Mr. Duro to decide to educate his children at home are not matters of ultimate concern to him. He has no religious belief which requires him to educate his children at home. The decision to educate his children at home was made because of his opposition to secular humanist values allegedly prevalent in the public schools and unisex dress; concerns which perforce come and go with changes in secular values or fleeting modes of dress and, therefore, are conditional and qualified. The "non-ultimate" nature of Mr. Duro's beliefs against education in schools is established by the District Court's opinion: Mr. Duro "does not believe that no acceptable school could be conceived, for he sent his children to school while attending Bible college." (A. p. 121)

II. Even if Mr. Duro has constitutionally protected religious beliefs against sending his children to public or nonpublic schools, the state's interest in compulsory education is of "sufficient magnitude to override" that interest.

That education is of the highest importance in a democracy cannot be doubted. *Brown v. Board of Education,* 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 2d 873

(1954); *San Antonio School District v. Rodriquez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16; *Wisconsin v. Yoder supra*, 406 U.S. at 213. It "has a fundamental role in maintaining the fabric of our society." *Plyler v. Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 72 L.Ed. 2d 786, 802 (1982). When children are not educated "significant social costs [are] borne by our Nation." *Id.*

This Court has consistently recognized that a State's interest in education may be furthered by requiring compulsory school attendance, even in the face of First Amendment claims. *Pierce v. Society of Sisters*, 268 U.S. 510, 534, 69 L.Ed. 510 (1925); *Wisconsin v. Yoder, supra; Wolman v. Walter*, 433 U.S. 229, 240, 97 S.Ct. 2593, 53 L.Ed. 2d 714 (1977). The scope and importance of this interest extends to permit the State to refuse "to accept instruction at home as compliance with compulsory education statutes." *Board of Education v. Allen, supra.*

In holding North Carolina's compulsory attendance statute unconstitutional as applied to Mr. Duro, the District Court itself recognized the theoretical extent of the State's interest in education.

> In the abstract, the state has a compelling interest in compulsory school attendance as a means of assuring that all children in the state receive a basic education sufficient to prepare them for the duties of citizenship, for participation in the political process, and for a self-sufficient and productive position in the society. (J.A. p. 124)

The District Court, however, refused to give North Carolina the benefit of this "abstract" principle because of a decision by the North Carolina General Assembly to deregulate nonpublic schools. As described by the District Court:

> The North Carolina compulsory school attendance law requires all children of school age to attend a school, which is defined "to embrace all public schools and such nonpublic schools as have teachers and curricula that are approved by the State Board of Education." N.C.G.S. §115C-378. In light of amendments made in 1979 and 1981 to the statutory provisions governing nonpublic schools, "approval" by the State Board of Education of a school is in fact nonexistent. The North Carolina General Assembly has radically deregulated the operation of nonpublic schools and removed from the State Board any supervisory authority. So long as a school notifies the Board that it is in operation, keeps attendance records, complies with health and safety requirements, and administers periodic standardized tests, attendance at the school qualifies under N.C.G.S. §115C-378. (A. p. 121)

Because of this recently adopted laissez-faire policy toward nonpublic schools, the District Court ruled that North Carolina's interest in compulsory education was not sufficient to override Mr. Duro's interest in maintaining his religious beliefs.

> The state has so drastically undercut its asserted interest in the universality of education that the court cannot conclude that what survives is compelling. If the state makes no attempt to maintain minimal educational standards in nonpublic schools, its requirement that a school be attended is little more than empty coercion, particularly when those children are in fact being relatively well-educated at home (A. pp. 125-126)

As the Fourth Circuit recognized, this reasoning by the District Court was erroneous. Mr. Duro, however perpetuates the District Court's error and argues in his petition that North Carolina's deregulation of nonpublic schools carried with it an abandonment of its compelling interest in education. Mr. Duro's error is established by an analysis of *Wisconsin v. Yoder, supra,* both from the perspective of the weight to be accorded Mr. Duro's asserted interest and from a comparison of North Carolina's approach to compulsory education with Wisconsin's.

In Yoder, this Court did not altogether abrogate Wisconsin's compulsory attendance law in the face of the religious claims of the Amish. Wisconsin's law was simply limited in its scope. To paraphrase this Court: Wisconsin's interest in requiring Amish children to attend public school beyond the eighth grade was not of sufficient magnitude to override the interest of Amish parents in integrating their children into the Amish religious community. It is this limited scope of the decision in *Yoder* which establishes the sufficiency of North Carolina's interest in its compulsory attendance law to outbalance the interest of Mr. Duro.

First, unlike the Amish parents, Mr. Duro seeks abrogation of the compulsory attendance law in its entirety, not simply its temporal limitation. In his concurring opinion in *Yoder*, Justice White, joined by Justices Stewart and Brennan, made it clear that the First Amendment does not permit complete nullification of compulsory school attendance on First Amendment grounds.

> This would be a very different case for me if respondents claim were that their religion forbade children from attending school at any time and from complying in any way with the educational standards set by the State. 406 U.S. at 238.

Since *Yoder*, two courts have considered the question of whether religious beliefs of parents relating to home instruction of their children outweigh total noncompliance with compulsory attendance laws and both courts have held against the parents. *West Virginia v. Riddle*, 285, S.E. 2d 359 (W. Va. 1981) and *Jernigan v. State*, 412 So. 2d 1242, 1245 (Ala. Ct. of App. 1981). As the West Virginia court said:

> Sincerely held religious beliefs are never a defense to total noncompliance with the compulsory school attendance law. 285 S.E. 2d at 365.

Further support for North Carolina's position is found in the recent decision of this Court in *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed. 2d 127 (1982) where guidance was provided as to the level of interest sufficient to outweigh an individual's First Amendment claim. In that case, an Amish farmer and carpenter, who held religious beliefs against the receipt of public insurance benefits and the payment of taxes to support public insurance funds, asserted that the required payment of social security taxes violated his First Amendment free exercise rights. This Court accepted the validity of the plaintiff's religious belief but held against him because of the nature of the governmental interest at stake. That governmental interest was simply the need for mandatory participation in the Social Security program in order to maintain the "fiscal vitality" of that program. 455 U.S. at 258.

The State's interest in requiring children to attend school is no less important than the fiscal intergrity of the Social Security System. "Education has a fundamental role in maintaining the fabric of our society. *Plyler v. Doe, supra.* Indeed one member of the Supreme Court, criticizing *Wisconsin v. Yoder, supra,* has expressed the view that a State's interest in requiring children to attend school "is surely not inferior to the federal interest in collecting social

security taxes." *United States v. Lee, supra,* 455 U.S. at 263, n. 3 (Stevens concurring).

Second, Mr. Duro, unlike the Amish, seeks this abrogation, not on the basis of the longstanding beliefs and practices of an *organized religious group,* but upon the basis of his *own* newly found "religious beliefs". To hold that the isolated beliefs of a single individual, whether religious in origin or not, are sufficient to override the long recognized substantial interest of the State in enforcement of its compulsory attendance laws is not permissible under *Yoder* and would, in practical effect, render compulsory attendance laws unenforcible and meaningless.

"The essence of American religion is its diversity and radial pluralism." *Toward a Constitutional Definition of Religion, supra,* at 1069 citing Ahlstrom, *A Religious History of the American People* (1972). Mr. Duro's objections to sending his children to public or nonpublic school because of concerns about "secular humanism" and "unisex dress" represent only a small fraction of the religious beliefs which could be interposed against compulsory education. For example, with the recent growth of "fundamentalism" it is not difficult to conceive of numerous "religious" reasons (e.g., the presence of dancing, required physical education, etc., in schools) which could be advanced by parents as a justification for ignoring compulsory attendance and educating their children in their homes. To respondent, these objections are legally indistinguishable from the objections of Mr. Duro. The Wisconsin Court of Appeals was on the mark when it said in rejecting a claim practically identical to Mr. Duro's:

> "Acceptance of [the parents] claim would open the door to all objections to part or all of the subject matter taught in public schools. The possibility of selective withdrawals of children by individual

> parents would effectively destroy the compulsory school system." *State v. Kasuboski*, 87 Wis. 2d 407, 275 N.W. 2d 101, 103 (1978).

Finally, it is clear that the question presented here is essentially one of educational policy; not one of legal principle applicable to this case. A State has two closely related, but nevertheless independent, interests in education. One is in the universality of education as recognized in *Wisconsin v. Yoder, supra*, 406 U.S. at 214; the other in the quality of education.

The State's interest here arises principally from its compelling interest in the universality of access to an education and that interest is sufficient to override plaintiff's interest. As a part of its commitment to universal education, North Carolina does not permit home instruction. It does not permit home instruction because the State has no mechanism by which to assure that children educated in their home by their parents are provided access to any education whatsoever. In the home instruction situation, the existence or nonexistence of any education is solely dependent upon the motivation and ability of the child's parents. And, unlike nonpublic schools, the State cannot rely upon the existence of collective market forces in the form of parental demands and concerns to assure that children have access to an education and that the education provided will be of some minimum quality.

Recourse to *Yoder* makes it clear that the relative level of control of the quality of programs in nonpublic schools does not effect the State's compelling interest in the universality of education. The degree of control exercised over nonpublic schools by Wisconsin at the time of *Yoder* does not differ markedly from the control exercised in North Carolina today. In Wisconsin, the only statutory requirements imposed upon nonpublic schools receiving

children of compulsory school age was, and is, that attendance reports be filed, 18 WSA 115.30, and that a very general curriculum be followed. 18 WSA118.01. By statute nonpublic schools were not required then or now to employ teachers certified by the State. 18 WSA 115.28(7). Given the relative lack of control by Wisconsin over the quality of education provided in its nonpublic schools, it clearly may be inferred that the compelling State interest identified and recognized by the Supreme Court in *Wisconsin v. Yoder, supra,* is universal education and not the quality of that education.

North Carolina has not waivered from its commitment to the universality of education. All children must attend a public school or a private school. Only the State's approach to the quality of education in nonpublic schools has changed. Previously, minimum quality in nonpublic schools was sought by means of regulations; now it is left largely to the collective concerns, demands and pressures of parents of private school children. This change reflects a shift in educational policy.

In *Yoder,* the Supreme Court admonished courts against delving into matters of educational policy:

> "Courts are...ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements." *Wisconsin v. Yoder supra,* 406 U.S. at 235.

And as Justice Powell stated in *San Antonio School District v. Rodriquez, supra:*

> The ultimate wisdom as to...[the] problems of

education is not likely to be divined for all time even by scholars who so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the State inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of everchanging conditions.

CONCLUSION

Mr. Duro may comply with North Carolina's compulsory attendance law by sending his children to the public schools, a private school or a church school. He has elected, however to attempt to instruct his six children at home, basically without a teacher, through the means of a programmed curriculum. That effort does not comply with North Carolina's compulsory attendance laws.

He attempts to have the compulsory attendance laws voided because of beliefs which can only be characterized as newly found, personal or philosophical. North Carolina's interest in having all children attend some type of "school" cannot be questioned. Balancing the petitioner's beliefs against the State's interest in accordance with *Yoder* requires denial of Mr. Duro's petition. To do otherwise would be to permit every parent, regardless of his ability, level of education, motive or intentions, to avoid sending his children to some school by simply asserting that because of his "religious views" he finds something offensive about the public or private schools. The First Amendment should not be construed to permit such a result.

This 30th day of December, 1983.

RUFUS L. EDMISTEN
ATTORNEY GENERAL

Edwin M. Speas, Jr.
Special Deputy Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies of the foregoing BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI were served upon counsel for Petitioner by depositing said copies in the United States Mail, postage prepaid, addressed as follows:

Mr. George Daly, Esquire
101 North McDowell Street
Suite 226
Charlotte, North Carolina 28204

This the 30th day of December, 1983.

Edwin M. Speas, Jr.
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Tele: (919) 733-7387
ATTORNEY FOR RESPONDENTS